

## Forum introduction: slavery, freedom, and law in the Civil War era

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Melissa Milewski and Kelly Kennington

### **Slavery, Freedom, and Law in the Civil War Era**

This forum explores civil actions at the intersection of slavery and freedom. The three articles use the trial records and opinions of civil cases to examine the interactions of enslaved and free people of African descent with courts before, during, and after the American Civil War. Disputes involving African Americans that took place throughout the nineteenth century reveal how litigants and jurists worked to position themselves according to the expectations of the white power structure and within the limits of existing statutes and precedents. In particular, the forum highlights the creative uses of legal arguments and understandings of freedom by African American litigants and their representatives. These articles also describe a judiciary that struggled with determining cases centered on African American freedom and rights. Before and after the Civil War, judges adopted particular arguments and sometimes created new categories to consider African Americans' claims. These lawsuits varied in character and time period, but through the processes of law they represent, the judiciary crafted precedents and authored opinions that had implications beyond the results of each individual case. All three authors argue for the wider ramifications of litigation and decisions involving the freedom, citizenship, and rights of African Americans in the decades surrounding the Civil War.

Each of the authors in this forum emphasizes a different aspect of civil litigation involving African Americans in the nineteenth century. Kelly Kennington's article focuses on appellate judges in suits for freedom throughout the antebellum United States. Judges in these cases often included commentary on the institution of slavery that contributed to broader debates between pro- and anti-slavery activists. Kennington seeks to explain why this commentary appeared in freedom suits and what it says about African Americans' legal participation.

Melissa Milewski's essay analyzes the trial records of civil cases between former slaves and their former masters between 1865 and 1899 in eight states across the U.S. South. She concentrates, in particular, on how the parties' interactions during slavery and their changing relations after the Civil War influenced their litigation against each other in post-war courts. To determine this, Milewski examines the narratives both sides told in the courtroom and the continuing shadow of slavery in former slaves' and former slaveholders' testimony. Giuliana Perrone's piece investigates the post-Civil War struggle African Americans faced to define and defend their understandings of civil rights. As Perrone argues, judges crafted their opinions in ways that sometimes recognized the newly-won rights of freedpeople retroactively and in other instances, chose to separate emancipation's freedoms from the era of slavery. The struggles judges faced to make these determinations led them to use creative terms to discuss Emancipation and its effects. All three of these articles embrace the messiness of studying slavery and freedom through the courts, recognizing the multiple and often contradictory actions of various parties in litigation and how ideological debates overlapped and were not easily resolved by courts or legislation.

Legal history scholarship has increasingly emphasized the role of African Americans in formal as well as informal legal processes during the nineteenth century. Rather than focusing largely on African Americans' exchanges with the law outside the courtroom, scholars are now showing how enslaved and free African Americans played significant roles in their own litigation, influenced understandings of citizenship and freedom through their legal action, and shaped legal doctrines as they forced judges to grapple with their demands.<sup>1</sup> The three pieces in

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<sup>1</sup> Scholarship focusing on African American involvement in informal processes of law includes Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, NJ: Princeton University Press, 2000); and Dylan C. Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 2003). See also Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009); and Kelly M. Kennington, *In the Shadow of Dred Scott:*

this forum build on this field of scholarship by underlining how African Americans challenged their former owners in the courtroom in the postwar period (Milewski) and by determining how black claims making influenced appellate judges and their articulations of the law both before and after the war (Kennington and Perrone).

The articles in this forum also contribute to the historiography of slavery and Reconstruction by linking these two eras together. Much of the previous scholarship on African Americans and civil law in the nineteenth century has focused on the era of slavery or on cases occurring during Reconstruction. This forum's work not only highlights black claims making before and after the war, but also demonstrates how postwar claims making was strongly influenced by the era before the Civil War. By viewing this litigation through a wider lens that connects the antebellum and post-war periods, these articles provide new perspectives on black litigation and its effects on jurisprudence. Milewski's article argues this point most forcefully, insisting that slavery continued to shape postwar interactions between formerly enslaved persons and their former enslavers. In her article, Milewski explains how frequently the experiences of slavery, and especially the memory of those experiences, influenced relationships and litigation between white and black litigants in the second half of the nineteenth century. Perrone also traces the ways that enslavement followed freedpeople into their postwar claims making, forcing judges to determine exactly how emancipation should work and whether to apply its changes retroactively.

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*St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017). For work on African Americans' involvement in the formal legal system, see Loren Schweninger, *Appealing for Liberty: Freedom Suits in the South* (Oxford: Oxford University Press, 2018); Kimberly M. Welch, *Black Litigants in the Antebellum American South* (Chapel Hill: The University of North Carolina Press, 2018); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York: Cambridge University Press, 2018), Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857* (New York: Cambridge University Press, 2016); and the work of the participants in this forum.

Additionally, these articles suggest new ways of looking at cases taking place in the American Civil War era, viewing litigation through different perspectives and through the eyes of multiple participants. By focusing on black litigants, white litigants, lawyers, and judges in these cases, these articles highlight how the various parties involved tried to leverage their role in the cases for different reasons and in unique ways. Antebellum judges used their decisions in such cases to try to shore up the system of slavery that they saw as increasingly under attack. After the Civil War, formerly enslaved litigants sought to gain economic ends that would have crucial effects on their family's finances or wrest the control of their children from former slaveholders. Black litigants also sometimes used their testimony to outline their own vision of what the postwar world should look like. To do this, litigants drew on their understanding of the law and local race relations as well as their long-term knowledge of former owners and other white community members. Former slaveholders also pursued their own ends through these suits, seeking to weaken the rights revolution orchestrated by African Americans and their allies in the wake of the Civil War. Multiple parties thus drew on their knowledge of the law and used the law for their own purposes. These different groups contributed to law not only through their immediate lawsuits but also by speaking to larger debates in society through their testimony, petitions, and opinions.

Finally, the articles included here elaborate on the extensive historiography looking at the meaning of freedom and citizenship rights for African Americans by bringing judges into these discussions.<sup>2</sup> Kennington considers how enslaved plaintiffs' claims for freedom forced judges to participate in debates over slavery and freedom that mirrored the tense political conversations

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<sup>2</sup> See especially the work of Eric Foner, including *Nothing but Freedom: Emancipation and Its Legacy* (Baton Rouge: Louisiana State University Press, 2007); Leslie A. Schwalm, *A Hard Fight for We: Women's Transition from Slavery to Freedom in South Carolina* (Urbana: University of Illinois Press, 1997); Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829-1889* (New York: Penguin Books, 2012).

taking place on college campuses, in the legislature, and in newspapers throughout the country. In doing so, the judges attempted to define slavery in ways that would protect white property ownership and restrict citizenship rights for African Americans. Perrone's piece reveals how African Americans' efforts to obtain and protect basic freedoms sparked creative definitions in judicial opinions. Suggesting that emancipation operated similarly to death in legal disputes, judges ultimately used a new legal fiction, the "former slave," to make sense of the enormous changes brought by Reconstruction.

All three articles discuss how the various participants in legal cases each brought distinct perspectives on freedom and rights to court, making civil litigation a significant battleground for determining what freedom, rights, and citizenship would mean in the nineteenth century. One key element of freedom was the ability to make decisions about one's family life, which included having marriages legally recognized, having children legitimated and supported, or protecting loved ones from exploitative apprenticeships or even violence. Milewski's article explains that both freedpeople and former slaveholders used their past histories together as well as their post-war experiences to battle over the apprenticeship of formerly enslaved children after the war. Similar, both groups drew on narratives of sexuality and sexual violence to gain the upper hand in civil suits between parties connected by slavery. For African Americans during the nineteenth century, access to the legal system and the ability to use it without restriction were also paramount to securing and protecting one's freedom. Lack of access to legal standing in court often served as an open invitation for enslavers and former enslavers to abuse their power over African Americans. All three of the articles in this forum touch on aspects of legal personhood, citizenship, and the legal rights and privileges that accompanied freedom.

These essays also add nuance to our understanding of the central role of law in the lives of black southerners in the era of the Civil War. As these articles illustrate, black men and women shaped the law and its outcomes and experienced the law shaping and influencing their own lives. Given the high stakes, it should come as little surprise that African Americans managed to accrue substantial legal knowledge in the decades surrounding the Civil War. Enslaved and freed people of African descent learned how to work within the law's limits, use the tools available to them, and make demands for their rights and freedom through the legal system. At times, they did so by presenting their own stories and interpretations of events to challenge the white power structure. Milewski shows, for instance, how former slaves' courtroom testimony drew on their understanding of the law and local race relations, as well as their long-term interactions with local whites, to influence the results of cases against their former masters. By creating new arguments and pushing for their rights in courts, African Americans also used their legal knowledge to wield influence over later jurisprudence and challenge their confinement to particular legal categories. Often, though, the outcome of civil suits impacted African Americans with particular force. Kennington demonstrates that when judges made decisions that clung closely to the letter of the law, it usually meant restrictions on African American litigants. Perrone explains, too, that postwar judges' constraints on African Americans' rights had both short- and long-term effects on freedpersons, influencing their immediate economic prospects as well as having a "trickle-down effect" because a single judicial denial of inheritance could prevent the accumulation of family wealth for generations. African Americans thus influenced the outcomes of their own civil claims and found that decisions in their cases could significantly affect their freedom and their finances.

The articles in this forum recognize the limits of using civil lawsuits. Legal records are filtered through courtroom clerks and the writings of attorneys or judges who create their narratives or opinions to serve specific purposes. The documents in each case file are also crafted to fit the requirements of existing laws and precedents and thus, have to be read with an eye toward understanding their context. These articles rely, as well, on the trial records and decisions of cases that reached appellate courts, which are not representative of all cases related to slavery and freedom during this period. Finally, although civil lawsuits provide more detail on African American lives than many other surviving sources, they are often missing key details that might help fill out the picture of litigants' experiences.

Yet the civil cases used by the authors in this forum reveal aspects of slavery and emancipation that are not fully apparent in other sources. They provide, for one, a still largely under-explored window into the ways in which various parties contended with the meanings of slavery and freedom in pre-war and post-war courts. The cases also allow the authors to trace continuity and change across the Civil War era, offering insight into the extent to which emancipation shifted legal and social worlds. In particular, these cases highlight the enduring significance of slavery in southern courts through the end of the nineteenth century. Perrone's article demonstrates the continuing relevance of the category of slavery to postwar cases involving free people of color. Milewski's work also establishes how these cases reveal the continued interactions between former slaves and former slaveholders after the war and the ongoing use of their antebellum pasts to gain the upper hand in the courtroom, even decades after emancipation. Civil cases provide insights into changes occurring across this period as well. Kennington, for instance, highlights how judges' extra comments about freedom suits changed over time, from the first decades of the nineteenth century to the decades immediately before the



Civil War. Milewski, too, notes how freedpeople and former slaveholders altered the stories they told about the world in response to emancipation.

By focusing on African Americans' civil lawsuits in the nineteenth century, this forum argues for the significance of law to understanding slavery and freedom in the years before, during, and after the Civil War. Uniting these eras allows the authors to consider how slavery influenced the postwar period and how ideas about freedom and civil rights grew out of antebellum experiences with law and legal arguments. Through their engagement with legal authority, African Americans gained valuable knowledge they used to attempt to better their lives and set precedents for future litigants. Their efforts to win autonomy and protect their rights were not always successful, but their brave stances on legal issues forced judges, attorneys, and community members to recognize their arguments and consider their perspectives. The records of their legal battles have much to teach us about the meaning of freedom for African Americans, the place of the Civil War in African American history, and the importance of considering multiple perspectives on these crucial debates.